

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

CAPITAL VENTURES INTERNATIONAL,

Plaintiff,

v.

NETWORK COMMERCE, INC., *et al.*,

Defendants.

No. C02-0682L

ORDER REGARDING PRODUCTION  
OF UNCONVERTED ELECTRONIC  
DOCUMENTS

This matter comes before the Court *sua sponte*. On April 26, 2005, the Court entered a discovery order which provided, in part, that “[i]f defendants have not yet uploaded and incorporated all of the electronic documents into a usable format, they shall, within two days of the date of this Order, provide a declaration of counsel to that effect and identify the date by which they expect to have completed the conversion . . . .” Order Granting Plaintiff’s Motion to Compel Initial Disclosures and Responses to Discovery Requests at 13. Defense counsel has filed a statement indicating that defendants have not made any progress converting the remaining 30% of their electronic documents and do not intend to do so: defendants would prefer to provide “native data” to plaintiff, which could then process that data, or not, as it sees fit. This proposal is remarkably similar to that made by plaintiff at the beginning of this discovery dispute, with the exception that defendants want to provide plaintiff with copies of the relevant servers and hard drives (for a small fee) rather than turning over the hardware itself.

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1 Having reviewed defendants' proposal and the remainder of the record regarding  
2 plaintiff's underlying motion to compel, the Court finds as follows:

3 (1) Contrary to defendants' assertion, the Court did address whether the general costs of  
4 processing the data from servers and hard drives should be shifted to plaintiff. They should not.  
5 Plaintiff shall pay for their own copies of documents, servers, and/or hard drives produced by  
6 defendants: it need not pay "any costs associated with uploading or incorporating documents  
7 into the Concordance database." Order of 4/26/05 at 13 (emphasis added). The fact that  
8 defendants have now replaced the word "uploading" with "processing" does not change the  
9 allocation of costs established by the Court.

10 (2) Within 2 days of the entry of this Order, defendants shall make available to plaintiff's  
11 counsel or their agent the servers and hard drives on which the remaining 30% of the electronic  
12 data is found, along with an electronic and hard copy of any related indices. All objections, with  
13 the exception of those based on the attorney/client privilege, are waived. Plaintiff's electronic  
14 discovery expert shall have 90 days from the date of production to copy any or all of the data in  
15 the servers and hard drives, after which the servers and hard drives shall be returned to  
16 defendants' counsel. Plaintiff shall bear the costs of copying the electronic data. Twenty days  
17 before any anticipated disclosure, plaintiff shall provide written notice to defendants regarding  
18 any document originating from this production that plaintiff intends to disclose to any person  
19 or entity other than plaintiff's counsel, plaintiff's electronic discovery expert, or plaintiff's  
20 documents vendor. A copy of each document plaintiff intends to disclose shall be attached to  
21 the notice. Plaintiff shall bear the costs of providing this notice and copy.

22 (3) Production of the electronic documents described in paragraph (2) is compelled and  
23 involuntary. The Court expressly finds that such production is a sanction imposed by the Court  
24 and does not constitute a waiver of the attorney-client privilege. Any privileged material made  
25 available to plaintiff or its agents shall retain its privileged status and shall not be disclosed to  
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1 any person or entity other than plaintiff's counsel and their agents. Upon receiving notice that  
2 plaintiff intends to disclose one or more documents produced pursuant to this Order, defendants  
3 shall thereafter have twenty days in which to identify documents in the set over which  
4 defendants claim privilege. Upon receipt of a privilege log regarding the documents over which  
5 defendants assert privilege, plaintiff's counsel shall promptly delete all electronic copies and  
6 destroy all hard copies of the identified documents in their possession or, within ten days of said  
7 notice, file a motion with this Court challenging the assertion of privilege. If defendants do not  
8 assert the privilege within the twenty-day period, plaintiff's counsel may, consistent with any  
9 applicable protective order, disclose to any person or entity the documents not identified as  
10 privileged.

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12 DATED this 2nd day of May, 2005.

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15 Robert S. Lasnik  
16 United States District Judge  
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